

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL J. TALLEY and)	
SUSAN TALLEY, husband)	
and wife,)	
)	
Plaintiffs,)	
)	C.A. No. 05C-08-311-PLA
v.)	
)	
TRI-STATE WASTE SOLUTIONS,)	
INC., a Delaware corporation, and)	
GEORGE T. COLLINS, SR.,)	
)	
Defendants.)	

UPON CONSIDERATION OF PLAINTIFFS' MOTION IN LIMINE TO
EXCLUDE CERTAIN TESTIMONY OF INVESTIGATING OFFICER
GRANTED in part, DENIED in part

Submitted: June 7, 2007
Decided: June 26, 2007

This 26th day of June, 2007, it appears to the Court that:

1. On March 3, 2004, Michael J. Talley was operating a motorcycle and traveling eastbound on Nottingham Road approaching the intersection of Jackson Hall Road. A trash-hauling truck, owned by Tri-State Waste Solutions, Inc. and operated by George T. Collins, Sr. (collectively "Defendants"), was traveling westbound on Nottingham Road and was preparing to make a left turn onto Jackson Hall Road. Mr. Collins

began to initiate the truck's left turn, unaware of Mr. Talley's approaching motorcycle until it was too late. The motorcycle collided with the truck. Mr. Talley suffered severe injuries, including the amputation of a leg. Mr. Talley and his wife, Susan Talley, (collectively "Plaintiffs") subsequently filed this action against the Defendants.¹

2. Plaintiffs have now filed a motion in limine pursuant to D.R.E. 701 seeking to exclude certain lay opinion testimony of the investigating police officer, Corporal John Dudzinski ("Cpl. Dudzinski"). First, Plaintiffs argue that Cpl. Dudzinski should not be permitted to testify as to the "primary contributing circumstance" of the accident. Plaintiffs maintain that a witness' testimony as to the "primary contributing circumstance" of an accident is inadmissible under D.R.E. 701, absent qualification of the witness as an expert in accident reconstruction. Therefore, Plaintiffs claim that, since Cpl. Dudzinski is not an expert in accident reconstruction, he should be excluded from testifying as to the "primary contributing circumstance" of the accident.²

3. Next, Plaintiffs contend that Cpl. Dudzinski should not be permitted to testify as to the "point of impact" of the accident. Plaintiffs

¹ See Docket 2. "Docket [#]" refers to the number assigned by LexisNexis File & Serve.

² See Docket 57.

argue that Cpl. Dudzinski did not take into account the vehicles' travel speed, the drivers' perception and reaction time, and the presence of a human leg in the roadway when he made the determination that the "point of impact" and the final resting place of Defendants' truck were the same. According to Plaintiffs, Cpl. Dudzinski's finding "is a complete physical impossibility" as "[n]o vehicle can stop instantly" after an accident. Plaintiffs conclude that Cpl. Dudzinski's "point of impact" finding, "plus his failure to notify the FAIR Team and inexperience in conducting a serious motor vehicle accident investigation on his own, renders his opinion" as to "point-of-impact" unreliable and inadmissible.³

4. Defendants concede that Cpl. Dudzinski is precluded from testifying as to the "primary contributing circumstance" of the accident. However, Defendants maintain that Cpl. Dudzinski is permitted to testify as to the "point of impact." Defendants argue that investigating police officers are permitted to testify as to facts which they see and as to inferences which they pull from the facts they perceive. Therefore, Defendants contend that Cpl. Dudzinski should be permitted to testify regarding all factual information he gathered at the accident scene including his determination of the "point of impact." Defendants further contend that, because Plaintiffs'

³ *Id.*

expert (Frank M. Costanzo) relied upon Cpl. Dudzinski's "point of impact" determination in making his calculations, Plaintiffs should be estopped from challenging Cpl. Dudzinski's "point of impact" finding.⁴

5. D.R.E. 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Lay opinion testimony on the "primary contributing circumstance" of an accident is inadmissible under D.R.E. 701.⁵ It follows that an investigating police officer, unless qualified as an expert in accident reconstruction, is not permitted to testify about the "primary contributing circumstance" of an accident.⁶ Therefore, because Cpl. Dudzinski is not an expert in accident

⁴ See Docket 71.

⁵ *Lagola v. Thomas*, 867 A.2d 891, 896 (Del. 2005).

⁶ See *id.* ("In this appeal we expressly overrule *Laws v. Webb*[, 658 A.2d 1000 (Del. 1995),] to the extent it permitted testimony from a police officer about the 'primary contributing circumstances' of an accident. Absent qualification of the witness as an expert in accident reconstruction, opinion testimony on the 'primary contributing circumstance' of an accident is inadmissible under [D.R.E.] 701. ... Patrolman Shepard's testimony that the 'primary contributing circumstance' of the accident was that [Plaintiff] was driving "too fast" was not testimony based upon facts he perceived but, rather, was a conclusion based on his opinion as a layman. Here, the required foundation to admit such a lay opinion was not established. Because Patrolman Shepard did not testify to the facts he perceived as a result of his investigation of the accident, his lay opinion testimony was inadmissible under [D.R.E.] 701. Our holding in this case is consistent

reconstruction, and further because Defendants have conceded this point, Cpl. Dudzinski is not permitted to testify as to the “primary contributing circumstance” of the accident at issue in this case.

6. An investigating police officer is, however, permitted to give testimony as to the “point of impact” of an accident, even if the officer is not an accident reconstruction expert.⁷ Therefore, even though Cpl. Dudzinski is not an accident reconstruction expert, he is permitted to testify as to the “point of impact” of the accident at issue in this case. The mere fact that Plaintiffs disagree with the manner in which Cpl. Dudzinski came to his determination of the “point of impact” does not make his findings unreliable. Rather, these are facts that go to the weight of the evidence and can be brought out by Plaintiffs during cross examination in an attempt to impeach Cpl. Dudzinski’s testimony.

7. Based on the foregoing, Cpl. Dudzinski is not permitted to testify as to the “primary contributing circumstance” of the accident, but is

with *Alexander v. Cahill*, [829 A.2d 117 (Del. 2003),] in which we held that a state trooper’s testimony attributing the *cause* of an automobile accident to the defendant motorists was an inadmissible lay opinion.”).

⁷ See *Szewczyk v. Doubet*, 354 A.2d 426 (Del. 1976) (“[T]he trial court did not abuse its discretion in admitting testimony by investigating police officer as to the point of impact, even though the officer was not an ‘accident reconstruction expert’[.]”); *Central Motor Lines v. Wank*, 1984 WL 10692 (Del. June 20, 1984) (the trial court did not abuse its discretion when allowing the investigating police officer to state his opinions as to fault and point of impact).

permitted to testify as to the “point of impact” of the accident. Accordingly, Plaintiffs’ motion is **GRANTED in part** and **DENIED in part**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Michael L. Sensor, Esquire
Michael K. Tighe, Esquire